UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/2002/NGO/39
24 January 2002

ENGLISH ONLY

COMMISSION ON HUMAN RIGHTS
Fifty-eighth session
Item 14 (c) of the provisional agenda

SPECIFIC GROUPS AND INDIVIDUALS: MASS EXODUSES AND DISPLACED PERSONS

Written statement* submitted by South Asia Human Rights Documentation Centre, a non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[15 January 2002]

*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE. *200201036 6*
ENG

Australia's flight from the Refugee Convention

In December 2001, the United Nations celebrated the 50th Anniversary of the United Nations 1951 Convention Relating to the Status of Refugees. However, the refugees have little to rejoice about. Australia's treatment of refugees, which the UN High Commissioner for Refugees, Ruud Lubbers termed as resorting to the "law of the jungle" and sending asylum-seekers "into orbit", exemplifies the predicament of the asylum seekers and refugees.

The case of the Norwegian freighter MV Tampa is a case in point. On 26 August 2001 a Norwegian freighter – the MV Tampa – rescued 433 asylum-seekers from a sinking Indonesian vessel; it housed the refugees for eight days while both Australia and Indonesia refused to accept them. An initial action of the Australian Government was to order SAS troops to board the Tampa in order to prevent it from docking on Australian soil.

Following a legal battle in the Tampa case, the Australian Federal Parliament debated the adoption of six bills regarding immigration issues. The Government justified the introduction of these legal measures by reference to Australia's self-proclaimed increasingly generous interpretation of the 1951 Refugee Convention. These measures represent a consistent and pernicious trend in refugee protection. The trend includes: limiting access by asylum-seekers to refugee status determination procedures – including the right to appeal, restrictive legal and administrative interpretations being given to relevant terms under the Refugee Convention, the use of administrative detention, visa restrictions, and the application of 'first country of asylum' and the 'safe third country' principles.

A package of six asylum-related bills passed through parliament during the week of 17 September 2001. Four have proved particularly contentious in terms of their human rights implications for 'illegal arrivals.'

Under the Migration Legislation Amendment Act (No 6), 2001 (MLA Act), the Australian Federal Court and the Refugee Review Tribunal are provided with artificially circumscribed definitions of the terms "refugee", "persecution" (as grounds for the granting of refugee status), "serious harm" and "membership of a particular social group" (as grounds for persecution) which limit their usage of these terms to a narrowly described scope of cases. Further exclusionary features of the MLA Act are the non-extension of refugee status from a child to its parents and the lowering to non-political crimes like serious property damage of those criteria that disqualify refugees for protection. Specifically, non-political crimes such as serious property damage will now render a person ineligible for refugee status and expose him or her to repatriation. Most fundamentally, the MLA Act undermines the principle of non-refoulement, the bedrock of the 1951 Refugee Convention and customary international law.

The Border Protection (Validation and Enforcement Powers) Act 2001 (BPB Act), introduces provisions regarding the detention of persons found on ships or aircraft, clarifies the powers of the arresting officer and specifies a new search power. Vessels may be prevented from arriving in or removed from Australian territorial waters – using "reasonable force" if necessary – if suspected of carrying "unlawful" immigrants. The BPB Act specifically excludes such people from being defined as being held in "detention", thereby effectively removing the opportunity for such people to resort to regular protection visa-claiming procedures. The BPB Act also retrospectively protects all action initiated by the government – from 27 August 2001 onwards – with respect to "vessels carrying unlawful arrivals". The Australian Government's actions with relation to the Tampa have accordingly been vindicated.

The Migration Amendment (Excision from Migration Zone) Act 2001 (MAB Act) excises certain territories from the Australian migration zone. The excised territories include the Christmas Islands, the Ashmore and Cartier Islands, the Cocos (Keeling) Islands and any other external territory, island or Australian sea or resource installation; in other words, those places that asylum-seekers arriving by boat are most likely to reach first. Under the MAB Act, people reaching Australian soil on "excised territory" are precluded from the regular process of seeking refugee status. Further, they are denied recourse to the kind of legal protection that would be required in order for them put their cases for refugee status.

Supplementing the BPB Act, the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (MAB II Act) gives discretionary power to officers to detain non-citizens entering or seeking entry into an "excised offshore place" if they are suspected "unlawful non-citizens". Such people may be taken to a declared country "in certain circumstances", and the MAB II Act specifies that "this does not amount to immigration detention". The Act again bars access to certain legal rights related to the entry, status and detention of non-citizens who enter Australia at an "excised offshore place". A "declared country" needs to satisfy certain itemised criteria for the Minister for Immigration but the country does not necessarily have to be a signatory of the Refugee Convention.

Another critical part of the MAB II Act deals with a "hierarchy of rights" which is "intended to deter further movement from, or the bypassing of, other safe countries". According to these provisions, "unauthorised arrivals" who may be fleeing persecution but who have bypassed other safe countries are only eligible for successive temporary protection visas and are therefore prevented from applying for any of the key protection, refugee and humanitarian visas.

While the Australian Government claims that the amendments "restore the application of the Refugee Convention to its proper interpretation", in truth, many changes undermine the Refugee Convention. Whether this narrowing of the domestic parameters of the Refugee Convention has been motivated by a desire to curb judicial activism in asylum cases or by November 2001 election appeal to xenophobia is moot. What is clear is that the provisions of the new Acts are unlikely to 'deter' unlawful asylum-seekers from trying to reach a place where they expect to escape persecution. As noted by Professor William Maley of the Refugee Council of Australia, "[t]hose being smuggled don't know about 'migration zones', and those who run the [trafficking] networks are unlikely to care."

According to the Australian Immigration Ministry, 1,847 "unauthorised arrivals" reached the Australian migration zone at off-shore territories between August 2001 and 2 January 2002; 599 persons were intercepted at sea and returned to Indonesia. This measure constitutes categorical denial of refugee claim. The powers of the Minister for Immigration to grant access to protection visas and to permanent residence on a discretionary basis is no substitute for the right to have one's claim for refugee status heard and determined by proper legal procedure and according to international legal obligations. UNHCR ExCom Conclusion No. 30 (iii) (1983) recommends that even an unsuccessful applicant for refugee status "should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory". When this recommendation is made for persons whose claim to refugee status has been effectively rejected, how much more stringently should this requirement hold for an applicant the merits of whose case have not even been considered yet?

A ministerial meeting to celebrate the 50th Anniversary of the 1951 Refugee Convention on 13 December 2001 clearly set out the limits of acceptability of any national policy on refugees and

asylum-seekers in a Declaration reaffirming the commitment of signatory States to the 1951 Refugee Convention. An Agenda for Protection called (amongst other things) for an emphasis on the implementation of 1951 Convention and the 1967 Protocol. However, Australian Immigration Minister Philip Ruddock stated that both the Declaration and the Agenda for Protection do not preclude debate on and an eventual implementation of a "new approach to handle the phenomenon of large-scale economic migration."

Australia – which used to preach human rights to the undemocratic States in the Asia Pacific region, is increasingly following their lead. North Korea withdrew from the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) following an August 1999 UN Sub-Commission resolution calling on North Korea to cooperate with the United Nations procedures. In March 1999, Australian Foreign Minister Alexander Downer similarly questioned the credentials of independent experts of the CERD Committee and Australia conducted an internal evaluation of its engagement with the United Nations bodies with the expressed belief that "Australia gets a better deal from the UN treaty committees." Australia's "tough stance" on asylum seekers again smacks of an unwillingness to cooperate – this time with the international regime for refugee protection.

The distinction between the preacher and the preached has become blurred.